INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	5
The Government's evidence	8
The evidence excluded by the court	15
(1) The Eggleston deposition	16
(2) The Newey tape recordings	20
(3) Conversation between Moser and a deceased Borden official	25
Specification of errors to be urged	26
Summary of argument	27
Argument:	
I. The challenged evidentiary rulings of the district court were clearly erroneous, and their effect was to deny the Government a fair opportunity to present its case	32
A. The district court erroneously refused to permit the Government to use Eggleston's deposition to impeach his trial testimony	33
B. The tape recordings of conversations between Newey and defendants' agents were not covered by the lawyer's work product privilege, and the court erroneously excluded them	39
1. The tape recordings were not within the work product privilege	41
2. McConnell waived any privilege with respect to the tape recordings by releasing them to Newey and authorizing him to turn them over to the Government	45

Argument—Continued Page
3. The district court's exclusion of the tape recordings substantially prejudiced the Government 48
C. The Illinois "dead man's" statute does not bar Moser's testimony as to conversations with a deceased Borden official 49
II. The fact that the outstanding decree in the *Dean* case enjoins the defendants from violating section 2 (a) of the Clayton Act does not bar the Government, in its own antitrust suit, from obtaining injunctive relief against such violations 51
Conclusion 56
Appendix 57

CITATIONS

Cases:

American Tobacco Co. v. *United States*, 147 F. 2d 93, affirmed, 328 U. S. 781 40
Bannon and Mulkey v. *United States*, 156 U. S. 464 40
Cafritz v. *Koslow*, 167 F. 2d 749 46
Cogdill v. *Tennessee Valley Authority*, 7 F. R. D. 411 45
Commonwealth v. *Clark*, 123 Pa. Super. 277, 187 A. 237 41
Creighton v. *Elgin*, 387 Ill. 592 51
Dean Milk Co. v. *American Processing and Sales Co.*, D. C. N. D. Ill. E. D., No. 49 C. 1159 ..... 8, 54, 57
Delaney v. *United States*, 263 U. S. 586 51
Federal Trade Commission v. *Cement Institute*, 333 U. S. 683 55
Frank v. *Cossitt Cement Products, Inc.*, 197 Misc. 670, 97 N. Y. Supp. 2d 337 41
Franzen v. *E. I. Du Pont De Nemours & Co.*, 146 F. 2d 837 35
Funk v. *United States*, 290 U. S. 371 43

BLEED THROUGH

Cases—Continued Page

General Electric Co. v. *Hygrade Sylvania Corp.*, 45 F. Supp. 714 55
Hickman v. *Taylor*, 329 U. S. 495 ..... 28, 29, 40, 41, 42, 43, 44, 45, 46
Hickman v. *Taylor*, 153 F. 2d 212 42
Hill v. *A. J. Canfield Co.*, 157 F. 2d 849 50
Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S. 229 40
Insul-Wool Insulation Corp. v. *Home Insulation*, 176 F. 2d 502 35
Kilpatrick v. *Kilpatrick*, 123 Conn. 218, 193 A. 765 41
Lauritzen v. *Atlantic Greyhound Corp.*, 8 F. R. D. 237, affirmed, 187 F. 2d 540 45
McGoorty v. *Benhart*, 305 Ill. App. 458, 27 N. E. 2d 289 41
Modern Woodmen of America v. *Watkins*, 132 F. 2d 352 43
Molloy v. *Trawler Flying Cloud*, 10 F. R. D. 158 .. 44
National Labor Relations Board v. *Pittsburgh S. S. Co.*, 337 U. S. 656 36
People v. *Hayes*, 21 Cal. App. 2d 320, 71 P. 2d 321 41
Reilly Tar & Chemical Corp. v. *Lewis*, 326 Ill. App. 117 50
Rivera v. *American Export Lines*, 13 F. R. D. 27 .. 35
Schell v. *Weaver*, 225 Ill. 159 51
Scourtes v. *Fred W. Albrecht Grocery Co.*, 15 F. R. D. 55 44
Shields v. *Sobelman*, 64 F. Supp. 619 45
State v. *Spencer*, 258 P. 2d 1147 41
Steen v. *First National Bank*, 298 Fed. 36 46
Steiner v. *United States*, 134 F. 2d 931, certiorari denied, 319 U. S. 774 43
Sutphen Estates v. *United States*, 342 U. S. 19 ... 55
Toplitz v. *Hedden*, 146 U. S. 252 ..... 27, 34
United States v. *Arrow Packing Corp.*, 153 F. 2d 669 40
United States v. *Bendix Home Appliances*, 10 F. R. D. 73 55

Cases—Continued Page

United States v. *General Electric Co.*, 95 F. Supp. 165 55
United States v. *W. T. Grant Co.*, 345 U. S. 629. 31, 55, 56
United States v. *Manton*, 107 F. 2d 834 40
United States v. *Moran*, 194 F. 2d 623, certiorari denied, 343 U. S. 965 41
United States v *Northern Securities Co.*, 128 Fed. 808, affirmed, 193 U. S. 197 55
United States v. *Paramount Pictures*, 334 U. S. 131 55
United States v. *Riccardi*, 174 F. 2d 883, certiorari denied, 337 U. S. 941 49
United States v. *Schanerman*, 150 F. 2d 941 41
United States v. *United Shoe Machinery Corp.*, 89 F. Supp. 357 43
United States v. *United States District Court for the Northern District of Illinois, Eastern Division*, Misc. No. 271, October Term, 1952 6
United States v. *U. S. Gypsum Co.*, 333 U. S. 364. 40

Statutes:

Clayton Act, Act of October 15, 1914, 38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526 (15 U. S. C. 13 (a), 25, 26):
Sec. 2 (a) 3, 52
Sec. 2 (b) 52
Sec. 2 (d) 54
Sec. 2 (e) 54
Sec. 15 ..... 4, 31, 52, 55
Sec. 16 55

Sherman Act, Act of July 2, 1890, 26 Stat. 209, as amended by the Act of March 3, 1911, 36 Stat. 1167, and by the Act of August 17, 1937, 50 Stat. 693, 15 U. S. C. 1 *et seq.*:
Sec. 1 3
Sec. 2 3
Sec. 4 3

Illinois Rev. Stat., 1945, C. 51:
Sec. 2 51
Sec. 4 ..... 4, 30, 49–50

ellaneous:	Page
51 Cong. Rec. 16276, 16319	55
Federal Rules of Civil Procedure, Rule 26 (d) (1)	27, 34
Note, 62 Harv. L. Rev. 269	43, 44
S. Rep. 698, 63d Cong., 2d Sess., pp. 42–50	55
3 Wigmore on *Evidence* (3d Ed.), §§ 792, 798*a* (b)	41
3 Wigmore on *Evidence*, 1953 Supp., § 792*a*	41
8 Wigmore on *Evidence* (3d Ed.), §§ 2196, 2327	46

BLEED THROUGH

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 464

UNITED STATES OF AMERICA, APPELLANT

v.

THE BORDEN COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 80) is reported at 111 F. Supp. 562.

JURISDICTION

The judgment of the district court was entered on July 17, 1953 (R. 125), and a timely petition for a new trial was denied on August 6, 1953 (R. 151). The petition for appeal was presented and allowed on October 2, 1953 (R. 430–431), and probable jurisdiction was noted on December 14, 1953 (R. 443). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29,

as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

QUESTIONS PRESENTED

1. Whether the district court erred in not allowing the Government to use a deposition, taken in another case, of a crucial Government witness who proved hostile, for purposes of impeaching his trial testimony by showing inconsistencies between such testimony and statements in the deposition.

2. Whether the court erred in holding that tape recordings of statements made by various agents of alleged conspirators, which the court excluded, were within the privilege attaching to the "work product" of an attorney, and that such privilege had not been waived.

3. Whether the court properly held inadmissible, under the Illinois "dead man's" statute, testimony as to conversations with a deceased agent of a defendant.

4. Whether the fact that a judgment entered in a private suit enjoined the defendants from selling at discriminatory prices justified the court in refusing to grant the Government similar relief against such conduct.

STATUTES INVOLVED

The pertinent provisions of Sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended by the Act of March 3, 1911, 36 Stat. 1167, and by the Act of August 17, 1937, 50 Stat. 693 (15 U. S. C. 1, 2, 4), commonly known as the Sherman Act, are as follows:

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SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

* * * * *

SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

The pertinent provisions of Sections 2 (a) and 15 of the Act of October 15, 1914, 38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526 (15 U. S. C. 13 (a), 25), commonly known as the Clayton Act, are as follows:

SEC. 2. (a) That is shall be unlawful for any person engaged in commerce, * * *

> either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *.
>
> * * * * *
>
> SEC. 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

The pertinent provision of Illinois Rev. Stat., 1945, C. 51, § 4, commonly known as the "dead man's" statute, is as follows:

> * * * in every action, suit or proceeding a party to the same who has contracted with an agent of the adverse party—the agent having since died—shall not be a competent witness as to any admission or conversation between himself and such agent * * *.

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STATEMENT

This is a civil proceeding instituted by the United States in June 1951 charging ten Chicago dairies[1] with conspiring to restrain and to monopolize, and with monopolizing, the sale of fluid milk to wholesale customers and certain public institutions in the Chicago area, in violation of Sections 1 and 2 of the Sherman Act, and with price discrimination in violation of Section 2 (a) of the Clayton Act (R. 23).

The complaint charged, *inter alia,* that, since 1940, the defendants had agreed to refrain, and had refrained, from competing for each other's wholesale (i. e., store and restaurant) customers (Pars. 27 (a), 30, 33, 34, R. 30, 32, 33); that defendants Borden and Bowman, the two principal dairies serving the Chicago area, had agreed to organize and operate "fighting" companies to destroy competing nondefendant milk distributors (Par. 27 (e), R. 31); that they had organized and utilized Belmont and Ridgeview, their respective subsidiaries, for that purpose; that, pursuant to their direction, Belmont and Ridgeview had engaged in

[1] The Borden Company (Borden); Bowman Dairy Company (Bowman); Belmont Dairy Company (Belmont), a wholly owned subsidiary of Borden; Ridgeview Farms Dairy, Inc. (Ridgeview), a wholly owned subsidiary of Bowman; Beloit Dairy Company (Beloit); Capitol Dairy Company (Capitol); American Processing and Sales Company, also known as Hawthorn-Mellody (Hawthorn); Hunding Dairy Company (Hunding); Meadowmoor Dairies, Inc. (Meadowmoor); and Western United Dairy Company (Western) (R. 23).

predatory price cutting (Pars. 41–43, R. 36); that the defendants had agreed to divide among themselves the business of selling milk to public institutions in the Chicago area and to fix the prices at which such milk would be sold (Pars. 27 (f), 27 (g), R. 31); that they had submitted collusive bids to such institutions (Par. 44, R. 36); and that they had retaliated against independent wholesale milk distributors who interfered with such allocation arrangements (Par. 45, R. 37).

The complaint also charged (Par. 26, R. 30) that each defendant had, pursuant to the conspiracy and in order to obtain the business of wholesale customers of non-defendant dairies (Par. 30, R. 32), sold milk at discriminatory prices in violation of Section 2 (a) of the Clayton Act, and that such price discriminations, often given secretly, were in the form of preferential prices, discounts, rebates, and other gratuities (Par. 47, R. 38).

After the district court (Judge Campbell) had, over the Government's objection, referred the case to a master for hearing and report, the Government filed in this Court a motion for leave to file a petition for writ of mandamus to require vacation of the order of reference. *United States* v. *United States District Court for the Northern District of Illinois, Eastern Division,* Misc. No. 271, October Term, 1952. Six days after the filing

BLEED THROUGH

of this motion, and prior to any action thereon, Judge Campbell vacated the order of reference.

In February 1953, a consent decree was entered against five of the defendants[2]—all relatively small dairies—enjoining them from continuing conduct of the kind charged against them in the complaint (R. 41). The case against the remaining defendants—Borden and Bowman, Belmont and Ridgeview, their respective subsidiaries, and Beloit, a smaller dairy—went to trial before Judge Campbell early in March. At the close of the Government's case, the defendants moved for dismissal of the action on the ground that the Government had failed to show that it was entitled to relief (R. 66–79, 429).

The district court on March 30, 1953, filed an opinion holding that, while the evidence showed that Borden and Bowman had taken parallel action in certain matters, the evidence that the defendants had acted by agreement and in concert was insufficient to establish conspiracy or combination, the foundation of the charges of Sherman Act violations (R. 107). The court also held that, while the evidence showed that Borden and Bowman each had sold at discriminatory prices,[3] the Government had no right to relief

[2] Capitol, Hawthorn, Hunding, Meadowmoor and Western.

[3] The court found that their subsidiaries, Belmont and Ridgeview, also had sold at discriminatory prices (Fdg. 36, R. 121–122). The court further held that the Government had failed to prove any violations of Section 2 (a) by defendant Beloit (R. 108).

for violation of Section 2 (a) of the Clayton Act because the judgment previously entered against Borden, Bowman and their subsidiaries in a private antitrust suit[4] comprehensively enjoined sales at discriminatory prices (R. 109–110). The court accordingly concluded that the complaint should be dismissed in its entirety as against the defendants who were then before it, the present appellees (R. 112).

The district court subsequently filed findings of facts and conclusions of law (R. 113), and entered judgment of dismissal (R. 175). A timely motion for a new trial was denied (R. 151–152).

THE GOVERNMENT'S EVIDENCE

Since the attack here is not on the court's findings on the record, but on the court's rulings which prevented the Government from establishing its case or misapplied the law to the case made out, there will be no attempt to review in detail all the evidence which the Government introduced to prove its case. The statement merely sets forth such portions of the evidence as are

[4] *Dean Milk Co.* v. *American Processing and Sales Co.*, D. C., N. D. Ill. E. D., No. 49 C. 1159. That suit sought injunctive relief and triple damages on the basis of alleged violations of the Sherman and Clayton Acts similar to those charged in the instant case. The defendants included Borden and Bowman. The case was settled on December 3, 1952, by the entry of a consent decree enjoining the defendants from violating the Sherman and Clayton Acts, and payment by the defendants of a substantial sum of money (R. 109, 160).

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necessary to an understanding of the issues, and to demonstrate the prejudicial effect of the challenged evidentiary rulings. To a large extent, it relies upon the district court's discussion of the evidence.

The Government's evidence consisted of the testimony of more than 50 witnesses—officials, employees, and customers of the defendants, and officials of competing independent dairies—and miscellaneous documentary material, including minutes of sales committee meetings of various defendants, and correspondence. This evidence, in brief, showed that the defendants concertedly refrained from competing for each other's wholesale milk business ("closed competition"), and directed their competitive efforts toward the business held by nondefendant independent dairies ("open competition"), particularly the Dean Milk Co. It further showed that certain defendants had divided among themselves the sale of milk to public institutions.

A number of Bowman and Borden account solicitors testified that they had been instructed by their superiors not to solicit closed competition. Herbert Horton, a Bowman solicitor, was told by a company official that he "wasn't to solicit any stops, such as Wanzer, [H]unding, Beloit, Borden, Western United, Capitol Dairy, and Hawthorne—all the major large ones that was there," and that "open competition was any stops, like these smaller

dairies * * * (R. 86). Another Bowman solicitor, upon going to work, was told that "open competition" was new business, business which was closed and reopened after thirty days, and "cut-rate" dairies, and that he was not to solicit closed competition which included, among others, defendants Borden, Hunding, Capitol, and Western (R. 85). Sedlak, another Bowman solicitor, was told by his superior that he was not to solicit stops like Borden, Capitol, and Western, and he described instances in which his superiors did not permit him to begin serving stops which were then served by Borden or Capitol (R. 85–86).

When Bowman solicitor Johnston sought permission to serve a stop which was served by Beloit, his superior told him that Bowman had an "agreement" with Beloit, but that he should "go ahead and serve it for awhile and see what happens," even though Bowman "might have to give up another stop equivalent to it in order to keep it." After serving the stop for a week, Johnston was directed to discontinue service, since, as he was told, "we would have to quit serving or give up a stop to Beloit equivalent to that" (R. 87). Stephens, a Borden solicitor, was told by his superior not to comply with requests for service at stops then being served by defendants Bowman, Western, Hawthorn, and Capitol (*ibid.*), and a Borden wholesale foreman was not permitted to service a wholesale stop served by Bowman (R. 88).

Food stores and restaurants which were served by one of the defendants were unable to obtain milk directly from another defendant. Such stores which sought service from Meadowmoor were informed that Meadowmoor could not serve them because "they had an association with some of the bigger companies not to take stops from each other" (R. 90 (5)), "because of an 'agreement'" (R. 90 (7)), or because "[t]hey have an association that they can't put milk in a store by taking a stop away from another [dairy]" (R. 91 (10)). A store owner served by Borden was told by a Bowman representative that Bowman could not serve him "as long as I have Borden" (R. 90 (4)); another store owner was told by a Borden representative that he could not switch from Capitol to Borden (R. 89 (1)). A grocery store served by Hawthorn, which threatened to change its patronage unless given an icebox, was informed that there was "a 'working agreement' between dairies, which prevented storekeepers from moving from one dairy to another" (R. 92 (14)).

Customers who wished to switch from one defendant to another sometimes were "farmed out" to an independent dairy ("open competition") for 30 days, thus permitting the acquiring dairy to take over the account while paying lip service to the defendants' understanding not to take each other's business. Thus, a grocery store which Meadowmoor refused to serve because it

was being supplied by Borden was advised that it "had to farm out for at least 30 days for a smaller company, and then they would take the stop over" (R. 90 (5)). After the store had taken milk from the Dean company for a month Meadowmoor consented to serve it (*ibid.*). Another grocer served by Borden similarly was told by Meadowmoor that it could not serve him unless he "first purchased Wanzer [an independent dairy] milk for four weeks" (R. 91 (10)). A restaurant owner who was dissatisfied with Bowman was refused direct service by Hawthorn. However, Hawthorn arranged for the restaurant to pick up its milk at a nearby store which Hawthorn served, and it was only after two or three weeks of this method of delivery that Hawthorn began to deliver milk directly (R. 91 (9)).

Meetings were held at which the defendants reached agreement on various problems arising out of their competitive situation. Charles Heinz, the manager of Bowman's Evanston, Illinois, branch from 1935 to 1945 [5] (R. 357–358) was under instructions during this period that defendants Borden and Beloit were closed competition in his area, and that the open competition, available for solicitation, were the smaller dairies (R. 365–366).[6]

[5] Heinz had been a Bowman employee since 1924, and after leaving Bowman in 1945, was employed by defendant Hawthorn (R. 357).

[6] Heinz's testimony was given in a deposition which, pursuant to agreement among counsel and the court, was read into the record during the trial (R. 356).

BLEED THROUGH

Every two weeks, he met with the manager of Borden's Evanston branch to "trade stops," that is, "each would determine the amount of business he had taken from the other during a given period, and arrange to return a like amount during a subsequent period" (R. 95).[7] And, at the beginning of each school year, these two officials would agree upon the price at which they would sell milk to the fraternities and sororities at Northwestern University (R. *ibid.*).

At the meeting between Bowman and Borden officials, the formation of "fighting" subsidiaries was discussed, and an "understanding" was reached between them that Bowman would not use its fighting company (Ridgeview) "to go out and start a price war" against Borden, and that Borden would use its fighting subsidiary (Belmont) only to fight "vendor competition" (R. 93–94). An actual price war between Ridgeview (Bowman's subsidiary) and Hawthorn (prior to Hawthorn's joining the conspiracy) was settled at a meeting of Bowman and Hawthorn officials

[7] The practice apparently was that when one of the defendants took a stop away from another, the latter would have to give the former a substitute stop in return. Thus, when a Bowman stop was solicited in 1945, a Bowman official stated that "[w]e have an agreement with Borden, if they take the stop away from us we will get another one in return equivalent to it" (R. 87 (5)). On another occasion, a Bowman solicitor overheard his superior tell an official of Western over the telephone: "You know you took one of our stores, don't you?—Do you know what that means?—We have to go out and get one of yours!" (R. 86 (2).)

at which "both admitted that we were very foolish for getting into a price war" from which "the only one that was benefiting * * * was the storekeeper * * *" (R. 94).

The Government also introduced evidence relating to the defendants' division of the business of selling milk to public institutions, and their retaliation against independent dairies who tried to get such business. In a series of meetings held early in 1942 with Eggleston, a Bowman official, Heinz was informed that the milk business of the Great Lakes Naval Training Station and of Fort Sheridan "would be shared on an alternate [quarterly] basis with Borden Dairy Co." (R. 361). Charts and graphs introduced by the Government showed that particular defendants invariably were the successful bidders for certain institutions, that in some cases institutional business was shared alternately by two defendants, and that some defendants submitted different bids to different institutions even though the bids were made simultaneously on the same bid form (R. 105–106).

Independent dairies who bid successfully for the defendants' institutional business were threatened with reprisals. Thus, one dairy owner, after obtaining the contract to supply milk to a county infirmary, was told by officials of defendant Capitol that the county would pay him for the milk which he had furnished under the contract only if he stopped bidding for the busi-

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ness, which he ultimately did (R. 104). Independent dairies which had bid successfully for defendant Beloit's institutional business were, on three different occasions, warned that Beloit would solicit the dairy's customers if such bidding continued, and on at least one of these occasions Beloit thereafter did take away a large account (R. 104–105).[8] On another such occasion, the Beloit official stated that Beloit and Hawthorn usually "handled" the account in question (R. 104).

THE EVIDENCE EXCLUDED BY THE COURT

The Government has assigned error to three evidentiary rulings by the district court which, in its view, collectively denied it a fair opportunity to present its case. These rulings were: (1) refusal to permit the Government to use a deposition, given by the witness Eggleston in a private antitrust suit, to impeach his trial testimony; (2) exclusion of tape recordings of conversations between the witness Newey and agents of five of the original defendants; and (3) exclusion of testimony as to a conversation between a Government witness and a deceased sales manager of Borden.

---

[8] An independent dairy which bid on the public school penny milk program was periodically called by a Bowman official before sealed bids were due, informed what Bowman was bidding, and requested to submit an identical bid (R. 354–356).

(1) THE EGGLESTON DEPOSITION

Prior to trial, the Government considered that one of its key witnesses was H. C. Eggleston, a director and sales manager of defendant Bowman during part of the period the alleged conspiracy was operating. In a deposition given in a private antitrust suit (*Dean* case, *supra,* n. 4), to which the Government was not a party, Eggleston had testified as to numerous conspiratorial acts on the part of Borden, Bowman, and other defendants. This deposition had been sealed and the presiding judge in the *Dean* case (Judge Igoe) had denied a Government motion (made prior to the instant trial) to unseal it, on the ground that, under the court rules, depositions could be unsealed only by the parties to the litigation. The Government then attempted to subpoena a copy of the deposition from counsel for plaintiff in the *Dean* case, but the court, early in the trial, refused to permit the Government to do so, on the ground that the deposition had been sealed (R. 158–163).[9]

The next day Eggleston appeared as a Government witness in the instant case. His testimony was in several respects directly contrary to that given on deposition. After the Government had pointed out that fact, and also that Eggleston was

[9] When Judge Igoe refused to unseal the deposition in the *Dean* case, he stated that, if Judge Campbell desired to have it unsealed, all he "has to do is send an appropriate order down here, and we will recognize it" (R. 161). In the instant case, the court, although asked to do so by the Government, refused to request the deposition's unsealing (R. 161, 163).

BLEED THROUGH

en receiving $6,000 a year from Bowman, e court allowed the Government to cross-amine him as a hostile witness (R. 177–178). The urt, however, refused to permit the Government use the deposition in such cross-examination, even ough Government counsel informed the court at, subsequent to the previous day's ruling, the eposition had been unsealed at the instance of ounsel for plaintiff in the *Dean* suit.[10] The fol-owing colloquy ensued (R. 186):

> Mr. JINKINSON [Government Counsel]. Your Honor, there has been a change in the depositions since then [yesterday].
>
> The COURT. I heard all argument on both sides yesterday, and ruled on the Eggleston deposition. The ruling will stand. Proceed with your evidence.
>
> Mr. JINKINSON. Your honor——
>
> The COURT. I will hear no further argument on that point from either side.
>
> Mr. JINKINSON. Your Honor, the Dean depositions have been opened. They were

[10] Bowman and Borden subsequently moved to reseal certain depositions on file in the *Dean* case, including the Eggleston deposition. On April 16, 1953, Judge Igoe entered an order denying resealing of the Eggleston deposition. In this order the court found (1) that the action of plaintiff's counsel in unsealing the depositions was "justified" and (2) that, in view of the charge that Eggleston's testimony in another cause was in conflict with his deposition filed in the private action, "it would not be in the interest of justice to reseal the Eggleston deposition until an investigation has been made of the facts and circumstances concerning such alleged conflict by the Department of Justice of the United States" (R. 137–138).

sealed yesterday, and they have now been opened.

The COURT. I will hear no further argument on the proposition. I have ruled on it. Will you proceed with your case. [See also R. 188–189.]

Eggleston's deposition—pertinent portions of which are set forth in the offer of proof which the Government then filed (R. 52)—contradicted his trial testimony in a number of significant aspects. The principal conflicts are as follows:

(1) At the trial, Eggleston testified that there was "very little" "stop buying" (offering of cash and other gratuities to induce stores to change suppliers) "done [by Bowman] prior to the time I left [June 1943]" (R. 266). In his deposition, however, Eggleston testified that at the time he left Bowman "stop buying" payments were "running maybe 100,000, 150,000 a year" (R. 55).

(2) At the trial Eggleston, when asked whether Ridgeview, Bowman's wholly owned "fighting" subsidiary (R. 193–194), had been operated at a loss, replied: "That I wouldn't know. I had nothing to do with the financial statements" (R. 200). But in his 1951 deposition Eggleston testified that, during the entire time he was with Bowman, Ridgeview was not operated at a profit and Bowman "absorbed the loss" (R. 57).

(3) During the trial, Eggleston denied that he had any agreement with Borden as to the alternate sharing of the milk business of Great Lakes

(R. 175–176). However, in his deposition Eggleston testified that "* * * we had a general understanding with the Borden Company that they would take Great Lakes * * * one quarter and we would take it the other quarter" (R. 61).[11]

(4) During the trial, Eggleston denied having any knowledge of an "arrangement" between Bowman and Borden concerning the division of the public school milk business "whereby they would bid on certain designated schools" (R. 269). But in his deposition Eggleston stated that Borden and Bowman would meet in the fall and agree on a division of the school milk business so that "[w]e wouldn't bid on Borden's schools or they wouldn't bid on ours" (R. 62–63).

(5) Eggleston testified at the trial that, during a price war between Ridgeview (Bowman's fighting subsidiary) and Hawthorn (a competitor), Ridgeview met Hawthorn's prices where "necessary to hold our business" but that "at no time did we go below their prices" (R. 217). But in his deposition Eggleston had testified (R. 59):

> We had men follow behind their [Hawthorn's] trucks and get the names and addresses of their stores and we turned them over to Ridgeview and they sent solicitors in there; and we sold milk as low as five cents a quart off the Ridgeview trucks and——

[11] See Heinz's testimony (*supra*, p. 14) that Eggleston informed him that Borden and Bowman were sharing the Fort Sheridan and Great Lakes milk business.

Q. Then what happened?

A. And Hawthorn was forced to meet that price on a number of accounts.

(6) Although Eggleston flatly stated at the trial that Bowman had "lost stops to the Belmont Dairy [Borden's "fighting" subsidiary]" (R. 200), he had previously stated in his deposition that Bowman and Belmont had a "general understanding" not to use their fighting companies against each other, and that "once in a while, why, Belmont might bother one of our accounts" and he would then call Borden "and tell them about it and it would be adjusted" (R. 58).

In holding that the Government had failed to prove its case, Judge Campbell found that "[p]ortions of Heinz's testimony, if true, would tend to prove the existence of the conspiracy" (Fdg. 18, R. 118). The judge held, however, that since he considered Eggleston, "over all, a truthful witness," and since Heinz's testimony conflicted with Eggleston's "in certain respects" (which the court did not specify), and since Heinz's testimony was not corroborated, Heinz's testimony had to be "discount[ed]" (R. 95).

(2) THE NEWEY TAPE RECORDINGS

Thomas C. McConnell, counsel for the plaintiff in the *Dean* case, had, in preparing that case for trial, secured the use of a grocery store in which milk was sold, wired it for sound, and placed a professional investigator (Paul Newey),

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who also was a lawyer, behind the counter in the role of store owner. Newey contacted five of the defendants, including Borden,[12] told them that he was taking milk from Dean but wished to change his supplier, and requested that they send a representative to discuss serving him. Representatives of each of them called on Newey in April 1950, and his conversations with them—in which they revealed that the defendants had an agreement not to take each other's customers (see *infra*, pp. 23–25)—were electrically recorded (R. 95–96, 373, 382, 387, 388, 390, 395, 396).

A subpoena *duces tecum*, issued to McConnell at the Government's request, called for the production of the Newey tape recordings (R. 96, 158). When McConnell, who was not counsel for any of the parties to the Government suit, made return on the subpoena in open court, he claimed that the recordings were privileged against production because they were his "work product," and the court sustained the claim (R. 96, 165–167, 169).

The Government then subpoenaed Newey to testify as to the conversations he had with the representatives of the five dairies (R. 96, 368). Prior to calling Newey to testify, however, the Government advised the court that it had subpoenaed him, that McConnell had turned over the tape recordings (and transcripts thereof) to Newey,

[12] The other four were Hawthorn, Capitol, Western, and Hunding.

and that Newey had the tapes in his possession and was refreshing his recollection by examining them. Government counsel then said (R. 368):

> It is a question of whether or not this court is going to hear those tapes, and if the Court is going to hear them the Government, of course, would like to have permission from the court to set up in the court room the necessary equipment so that the tapes can be played.

The court thereupon asked if McConnell was waiving his privilege, and Government counsel handed to the court a letter from McConnell to Newey authorizing the latter to submit the tapes to the defendants and to the Government for their use in this case "if the Court sees fit to require you to do so" (R. 148–149, 369). The court, after reading the letter, again ruled against admitting the tapes in evidence, saying that "the ruling made at the time Mr. McConnell asked for it still stands," and that "[t]here is no use of producing the tape recordings here" (R. 369). The court held, however, that Newey might use the tapes to refresh his recollection in connection with his testimony (*ibid.*).

Newey subsequently testified at considerable length, and in so doing used a transcript of the tape recordings and notes he had made thereon to refresh his recollection (R. 96). The court ultimately held, however, that Newey's testimony was "valueless," because it was not based upon

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independent recollection, but upon a reading of the transcript and notes made therefrom, and the court, therefore, concluded that it would "completely disregard" that testimony in reaching its conclusion that the Government had failed to prove conspiracy (R. 96).

Newey's testimony, which the court thus disregarded, set forth the substance of his conversation with each of the representatives who called on him, and was based upon the verbatim recordings of those conversations which the court refused to hear. In brief, the testimony revealed that the defendants' agreement not to take each other's customers, and to give cash and other gratuities to customers of non-defendant dairies for switching their patronage, was still operative in April 1950.

The Borden representative told Newey that it was fortunate that he took milk from Dean, because otherwise Borden could not do business with him, but that since Dean "did not cooperate with any of the other dairies," all the "other dairies were out to get all their [Dean's] stops" (R. 382).[13] Almost identical statements were made by Hawthorn's representative (R. 374–375, 377–378) [14]

[13] The Borden solicitor further stated that, except for Dean business, the only stores which Borden could solicit were those which had closed and whose new owner told the former supplier that "he doesn't want them any more" (R. 386).

[14] The Hawthorn representative told Newey that "it was fortunate for me that I had Dean's milk in the store there, because he wouldn't be able to do business with me otherwise"

who also stated that Hawthorn could take another dairy's stop "only where another dairy would take a stop away from them, and then to get even they could take one of the dairy's stops * * *" (R. 377). Capitol's representative told Newey that the dairies had an "ethical understanding" not to take each other's stops, and that all the dairies "cooperated in using this understanding excepting Dean. Dean was unethical" (R. 389). Western's solicitor stated that Western could solicit Dean's business because Dean was "open business" (R. 391). The Hunding representative told Newey that if Bowman or Borden had been supplying his milk, Hunding could not do business with him, since Hunding did not want to get into trouble "with the other dairies with whom they were cooperating" (R. 396). However, he stated that Dean's business was considered an "open stop" because "Dean's doesn't play ball" (R. 397).

Each of the five dairies also offered Newey financial or other inducements to shift his business from Dean to it. Hawthorn offered him, and later gave him, $200 for signing a one-year contract (R. 375, 381).[15] Capitol offered $250 if Newey

(R. 374), and that "he couldn't take Dean's stops, because Dean didn't cooperate with the other dairies" (*ibid*). The Hawthorn representative stated that he would not serve stores being served by defendants Weiland, Bowman, Western, Borden, and Beloit (R. 375).

[15] The Hawthorn representative refused to give Newey a copy of the signed contract because it was "illegal" (R. 381).

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would sign a one-year contract (R. 388). Western offered to supply milk for two weeks without charge if Newey switched to it (R. 392). Hunding offered $150 (R. 397), and Borden, although unable to give any cash because it was "under indictment" (R. 383), offered to advance Newey the funds to purchase a refrigerator, providing that Newey would sign a statement for the company that he was going to use the money "solely for the purpose of replenishing stock and not * * * to buy any tangible property" (R. 386).

(3) CONVERSATION BETWEEN MOSER AND A DECEASED BORDEN OFFICIAL

The court refused to permit Moser, an executive of an independent dairy, to relate a conversation he had with Baril, a deceased sales manager of defendant Borden, on the ground that such testimony was barred by the Illinois "dead man's" statute which bars testimony by a party to an action concerning conversations with a deceased agent of the adverse party (R. 351).[16] This testimony—as shown by the Government's offer of proof (R. 65)—was that, after Moser had bid successfully to sell milk to the Navy Pier in 1943, Baril told him that the Pier was "Borden's busi-

[16] Earlier in the trial, when the question arose as to testimony relating to a conversation with another deceased official of one of the defendants, the court stated that under the Illinois statute "where the lips of one party to a two-party conversation is sealed in death, the living party may not testify to what it was" (R. 156).

ness," and asked him why he had bid on it (*ibid.*). Moser explained that he needed Government business in order to obtain a priority for machiney (*ibid.*). When Baril told Moser that Borden would have to offset the loss of the Pier business by taking some of Moser's store accounts, Moser stated that he would not bid again for the Pier. He never bid on it again, and did not lose any store accounts to Borden (*ibid.*).

SPECIFICATION OF ERRORS TO BE URGED

The district court erred:

1. In holding that the deposition given by Eggleston in the *Dean* case could not be used to refresh his recollection or to impeach his testimony in this case.

2. In holding that tape recordings of conversations between the witness Newey and agents of certain of the defendants were privileged as an attorney's work product, and therefore could not be subpoenaed from the attorney for whom they had been made.

3. In failing to hold that the attorney had waived his claim of privilege, and in excluding the recordings after such waiver.

4. In holding that testimony by Government witness Moser as to a conversation he had with a deceased agent of defendant Borden was barred under the Illinois "dead man's" statute.

5. In holding that the Government was not entitled to a decree enjoining defendants Borden

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d Bowman and their subsidiaries from violating
ction 2 (a) of the Clayton Act, because such vio-
ions were enjoined by a decree previously en-
ed against them in a private action.
6. In dismissing the complaint.

SUMMARY OF ARGUMENT

I

A. The only reason given by the district court
r refusing to allow the Government to use Eg-
eston's deposition to impeach him was that the
position had been sealed. Once the deposition
as unsealed, however, the reason for its ex-
usion no longer existed, and the Government
en had the right to use it to show that the
itness "had made contradictory statements, oral
written, on the subject" (*Toplitz* v. *Hedden,*
6 U. S. 252, 254). Indeed, Rule 26 (d) (1) of
e Federal Rules of Civil Procedure specifically
uthorizes the use of depositions to impeach a de-
nent's trial testimony.

In his deposition, Eggleston made a number of
atements which flatly contradicted his trial
stimony on matters of importance to the Gov-
rnment's case. If the Government had been
ermitted to show these contradictions, Eggles-
n's credibility as a witness would have been
verely shaken, and the district court would have
ad good reason for giving his trial testimony
ttle credence. This, in turn, would have raised

the probative value of the deposition testimony of Heinz, a key Government witness. For the district judge, although recognizing that "[p]ortions of Heinz's testimony, if true, would tend to prove the existence of the conspiracy," nevertheless "discount[ed]" that testimony because he believed that Eggleston, whom he had observed on the stand, was "over all, a truthful witness," and because Eggleston's testimony "[i]n certain respects" negatived that of Heinz. Thus, by denying the Government the right to impeach Eggleston through his own contradictory deposition statements, the trial court deprived the Government of vital evidence "tend[ing] to prove the existence of the conspiracy."

B. (1) The tape recordings of conversations between the witness Newey and agents of the conspirators were not within the attorney's "work product" privilege. As *Hickman* v. *Taylor,* 329 U. S. 495, makes clear, there is no general privilege against disclosure of material which a lawyer has assembled in connection with pending or recent litigation. The case merely held that, under the pre-trial discovery provisions of the Federal Rules of Civil Procedure, a party to pending litigation could not obtain from counsel for his adversary, on mere demand and as of right, statements of witnesses which counsel had obtained in the course of preparing for possible litigation.

The rationale of the *Hickman* case—that an attorney, while preparing his case, should be

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ree from interference by "opposing parties and heir counsel"—has no applicability where, as ere, the material is sought not by a litigation dversary, but by a party to another case in hich the lawyer is not participating. Moreover, ven under *Hickman,* material in a lawyer's pos- ession which is *admissible as evidence* is not priv- eged. Finally, unlike the situation in *Hickman,* ere the other case had been concluded, and pro- uction of the tape recordings or disclosure of heir contents could not have interfered with the ttorney's conduct of that litigation.

(2) Assuming *arguendo* that the tape record- ngs were privileged initially when the Govern- nent sought to subpoena them, the attorney vaived any privilege when he turned them over to Newey and authorized the latter, if the court di- ected him to do so, to submit them to the defend- nts and to the Government "for their use in the ase." A privilege is personal to the individual laiming it, and may be waived by him.

(3) Newey's testimony, which was based on the ecordings, set forth admissions by agents of the onspirators showing the operation of the con- spiracy in 1950. The district court held, however, hat since Newey had no independent recollection of the transcribed conversations, his testimony was "valueless," and the court "completely dis- regard[ed]" it. Had the district court admitted he recordings, Newey's lack of recollection would have posed no problem, and the court

then could have given these damaging admissions their full probative weight. Thus, the practical effect of the exclusion of the recordings was to deny the Government completely the benefit of this important evidence.

C. The court excluded evidence of a conversation between an executive of an independent dairy and a deceased sales manager of defendant Borden, as banned by the Illinois "dead man's" statute. But that Act, by its express terms and as interpreted by the Illinois courts, bars only testimony *by a party* to an action as to conversations with a deceased agent of the defendant, and does not generally bar testimony by the survivor of a conversation. Since the independent dairy executive was not a party to the instant case, he was not disqualified from testifying as to the conversation.

His testimony related to a successful attempt by Borden to coerce him into refraining from future bidding on Borden's business. Its exclusion further deprived the Government of pertinent evidence probative of the conspiracy.

II

The district court held that, although the Government had shown discriminations in price by defendants Borden and Bowman and their subsidiaries which were in violation of section 2 (a) of the Clayton Act, the Government was not entitled to injunctive relief against such viola-

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tions because they previously had been comprehensively enjoined by a decree in a private antitrust suit. The existence of such a private decree, however, does not terminate the duty of the Attorney General, under section 15 of the Act, to enforce the Act or the need for such enforcement, or the district court's duty to entertain such proceedings.

Even though the decree in the private suit initially may afford the public the same measure of protection as a decree in a Government suit, entry of a decree frequently is not the end of antitrust litigation, and subsequent action or inaction by the private parties may substantially weaken the decree's effectiveness so far as the public is concerned. If the private decree is violated, the United States, not being a party to the suit, cannot bring contempt proceedings to enforce compliance, and the private party may have good reason for not instituting such proceedings. Furthermore, the private parties, even though they fully comply with the decree, may seek modifications which, if granted, will substantially weaken its original protective effect. In short, the protection of the public, which it is the object of the antitrust laws to insure, cannot be achieved if the Government is denied the right to relief because of the existence of a private decree.

United States v. *W. T. Grant Co.*, 345 U. S. 629, does not support the district court's ruling.

That case merely held that the Government there had not shown any need for injunctive relief, since the illegal conduct has been discontinued and there was no "cognizable danger of recurrent violation." In the instant case, however, the Government has shown a real need for relief.

ARGUMENT

I

THE CHALLENGED EVIDENTIARY RULINGS OF THE DISTRICT COURT WERE CLEARLY ERRONEOUS, AND THEIR EFFECT WAS TO DENY THE GOVERNMENT A FAIR OPPORTUNITY TO PRESENT ITS CASE

In Point I, we discuss separately each of the challenged evidentiary rulings, show that error was committed, and demonstrate the resulting prejudicial effect. The prejudicial impact of these rulings is increased when they are considered collectively. The district court's finding that the Government had failed to prove conspiracy was made after the Government had been precluded from effectively cross-examining a key hostile witness upon whose testimony the court greatly relied, and the court had excluded admissible and relevant evidence. In short, the court based its decision upon a record from which vital elements of the Government's case had been improperly excluded.

We do not challenge the court's conclusion that, on the record before it, the Government had not shown conspiracy. But we do contend that, if the court had permitted the Government to

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utilize and introduce the foregoing excluded evidence, it could not reasonably have granted the motion to dismiss the complaint.

A. THE DISTRICT COURT ERRONEOUSLY REFUSED TO PERMIT THE GOVERNMENT TO USE EGGLESTON'S DEPOSITION TO IMPEACH HIS TRIAL TESTIMONY

The truthfulness of Eggleston, a hostile Government witness, was of pivotal significance in this case. It was because the district court accepted Eggleston's testimony that it "discount[ed]" the testimony of Heinz, a key Government witness—testimony which, as the district court recognized, "if true, would tend to prove the existence of the conspiracy" (Fdg. 18, R. 118). Thus, the practical effect of the district court's refusal to allow the Government to impeach Eggleston by showing that he had made contradictory statements in a deposition given in another case was to deprive the Government of the benefit of vital evidence "tend[ing] to prove the existence of the conspiracy."

We do not here challenge the district court's initial ruling that, because the deposition had been sealed, the Government was not entitled to subpoena a copy thereof.[17] But the court clearly

[17] Judge Igoe indicated that the reason for keeping the deposition sealed was that, since the *Dean* case had been settled, there was no reason for disclosing its contents (R. 160–161). But, this hardly seems a sufficient reason to justify refusal to permit the Government access to the facts in its antitrust proceeding.

committed prejudicial error when, after the deposition had been unsealed and that fact had been called to his attention, he nevertheless continued to hold the deposition inadmissible. For once the deposition was no longer under seal, the Government was entitled to use it to impeach Eggleston. Indeed, when the district court ruled that the Government could not subpoena a copy of the then-sealed deposition, he recognized that if the deposition were not sealed, it could be used to impeach the witness (R. 162).

Although Eggleston had been called by the Government, the court permitted him to be cross-examined as a hostile witness (see *supra,* pp. 16–17). In conducting such cross-examination, the Government had the right to show that Eggleston "had made contradictory statements, oral or written, on the subject" (*Toplitz* v. *Hedden,* 146 U. S. 252, 254), and to use Eggleston's deposition for that purpose. Indeed, Rule 26 (d) (1) of the Federal Rules of Civil Procedure specifically authorizes the use of depositions to impeach a deponent's trial testimony. It provides that "[a]ny deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness." Plainly, once Eggleston's deposition had been unsealed, the Government was entitled to use it to show that the trial testimony of this hostile witness was untrustworthy because contradicted by his prior statements. A deposition taken in one case is admissible *as evidence* in another case against parties

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who had notice of its taking *Franzen* v. *E. I. Du Pont De Nemours & Co.*, 146 F. 2d 837, 841–842 (C. A. 3); *Insul-Wool Insulation Corp.* v. *Home Insulation*, 176 F. 2d 502, 504 (C. A. 10); *Rivera* v. *American Export Lines*, 13 F. R. D. 27, 28–30 (S. D. N. Y.). Clearly, therefore, it can be used in the second case for the more limited purpose of impeaching the deponent's testimony there.[18]

In his deposition Eggleston made a number of statements which on their face flatly contradicted his trial testimony on important matters involving the heart of the Government's case (see Statement, *supra*, pp. 18–20). These contradictions related to (1) understandings between Bowman and Borden to divide the business of selling milk to certain military installations and public schools; (2) price wars and the use of fighting companies; and (3) the giving of cash gratuities to induce wholesale customers to shift their patronage from independent dairies to the defendants (*ibid.*)

If the Government had been permitted to confront him with these contradictions, Eggleston might have been induced to admit the truth of the facts in his deposition and, if not, his credibility as a witness would have been severely shaken. In

[18] The fact that Beloit was not a party to the *Dean* case and did not participate in the deposition proceedings does not justify the trial court's ruling. The issue before the trial court was not whether to admit the deposition as evidence, in which event such objection might be pertinent, but whether to permit the Government to use it to show that Eggleston previously had contradicated his trial testimony.

any event, the district court would have had good reason for giving his trial testimony little credence. See *National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 337 U. S. 656, 659. This, in turn, would have raised the probative value of the testimony of the Government's witness, Heinz, and thus strengthened the Government's *prima facie* case.

As we have shown (*supra*, pp. 12–14), Heinz testified (on deposition) that Borden and Bowman had an understanding not to compete for each other's wholesale customers, and to share certain institutional business. The district court recognized that "[p]ortions of Heinz's testimony, if true, would tend to prove the existence of the conspiracy alleged in the complaint" (Fdg. 18, R. 118). The judge, however, "discount[ed]" that testimony because (1) he believed that Eggleston, whom he had observed on the stand, was "over all, a truthful witness," (2) he had been unable to judge Heinz's credibility, and (3) Eggleston's testimony "[i]n certain [unspecified] respects" negated Heinz's alleged uncorroborated testimony (R. 95). In other words, the court chose to believe Eggleston rather than Heinz because of its appraisal of Eggleston's credibility.

Eggleston's veracity thus was a critical issue in the case. Eggleston was an important official of one of the two principal defendants, and the court's acceptance of his testimony unquestionably was a major factor in reaching the decision that

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the Government had not proved its case. But if the Government had been allowed to impeach this hostile witness out of his own mouth, the court would have had no occasion to discount Heinz's testimony which, admittedly, "tend[ed] to prove the existence of the conspiracy."

The fact that Eggleston's trial testimony on certain aspects of the case was, pursuant to court order, restricted to events occurring since 1940,[19] while his deposition testimony generally may not have been so limited, afforded no basis for excluding the deposition. Much of the deposition testimony related to events after 1940, such as testimony as to the substantial volume of "stop buying" when Eggleston left Bowman in 1943 (*supra,* p. 18), or to matters as to which the 1940 cut-off date was not applicable, such as the formation and use of Bowman's and Borden's fighting subsidiaries (R. 51). The other contradictory portions of the deposition did not identify the particular years involved, and on their face related to both pre- and post-1940 events. Indeed, Heinz's testimony that Eggleston informed him, at a series of meetings during the first six months of 1942, of an agreement

[19] Prior to trial, the district court held that, except as to evidence dealing with the formation and operation of Ridgeview and Belmont, the Government would not be allowed to introduce evidence of events prior to September 16, 1940—the date of entry of a consent judgment which terminated a prior Government antitrust suit against certain of the defendants (R. 48).

between Bowman and Borden to share the milk business of two military installations (R. 361), indicates that Eggleston was referring to post-1940 events when he testified on deposition that Bowman and Borden had such an agreement (R. 61). In any event, this possible reconciliation between Eggleston's deposition and his trial testimony is a matter for explanation by him when confronted with the contradictory prior testimony; it cannot now be used to justify exclusion of the deposition.[20]

The express—and only—reason given by the trial court for denying the Government the use of the Eggleston deposition was that it was under seal. Once the deposition had been unsealed, however, the reason for its exclusion no longer existed, and the Government had the right to use it to impeach a hostile witness by showing his prior contradictory statements. The trial court's refusal to permit use of the deposition under these circumstances, with the consequential acceptance of the testimony of Eggleston and rejection of that of Heinz, was clearly erroneous and prejudicial.

[20] Appellees may argue that Eggleston's deposition merely duplicates material in an affidavit given by him in the *Dean* case, which the Government used at the trial in cross-examining him. The affidavit is not a part of the record of trial. It merely summarizes the more detailed information in the deposition, and does not contain the specific facts in the deposition which contradict Eggleston's trial testimony.

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B. THE TAPE RECORDINGS OF CONVERSATIONS BETWEEN NEWEY AND DEFENDANTS' AGENTS WERE NOT COVERED BY THE LAWYER'S WORK PRODUCT PRIVILEGE, AND THE COURT ERRONEOUSLY EXCLUDED THEM

Twice during the trial, the district court refused to permit the Government to utilize tape recordings of conversations between Newey and agents of the defendants, on the ground that such recordings were privileged as "work product" because they had been prepared by McConnell, counsel for plaintiff in the *Dean* case, for his use in that litigation. The first ruling was made when the Government attempted to subpoena the recordings from McConnell himself, and McConnell claimed privilege. The second ruling was made by the court *sua sponte* when, after McConnell had released the tapes to Newey and specifically authorized him, if the court should so direct, to turn them over to the Government for use in this case, the court nevertheless refused to permit the Government to set up equipment for playing the recordings in the courtroom.

These rulings apparently were grounded on the court's theory that all material which a lawyer has assembled in connection with pending or recent litigation enjoys a general privilege against disclosure.[21] We submit, however, that such a broad concept of the lawyer's "work product"

[21] The court, in initially sustaining McConnell's claim of privilege, stated that he did not "see any reason for requiring him to turn over that or any other portion of his work papers or his preparation for trial in another case" (R. 169).

privilege was specifically rejected by this Court in *Hickman* v. *Taylor,* 329 U. S. 495. The work product privilege has no applicability to material which is sought for introduction in evidence in another case in which the lawyer affected is not participating. The tape recordings were admissible evidence—mechanical reproductions of admissions made by co-conspirators in the course of a conspiracy [22]—and their exclusion by the court was prejudicial error.

[22] In brief, the tapes set forth conversations between Newey and agents of five of the defendants (Borden, Capitol, Western, Hunding, and Hawthorn), in which each agent told Newey that the dairies had an agreement not to take each other's wholesale customers, and offered him gratuities to shift his business from the Dean Milk Company (see Statement, *supra*, pp. 23–25). These statements were made by the employees in the course of their employment (see *supra*, p. 21). The admissions of the Borden representative obviously were admissible against appellee Borden. Further, the statements of all of the agents were admissible against their respective employers' co-conspirators, the present appellees, as admissions of conspirators made in the course and furtherance of the conspiracy. *Bannon and Mulkey* v. *United States*, 156 U. S. 464, 469; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 249–250; *American Tobacco Co.* v. *United States*, 147 F. 2d 93, 118 (C. A. 6), affirmed, 328 U. S. 781. Plainly, there was sufficient independent evidence of conspiracy, apart from the Newey conversations, to make these admissions competent against the other defendants (see Statement, *supra*, pp. 9–15). Cf. *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, 388–389; *United States* v. *Arrow Packing Corp.*, 153 F. 2d 669, 670–671 (C. A. 2); *United States* v. *Manton*, 107 F. 2d 834, 843–844 (C. A. 2).

Contemporaneous mechanical reproductions of events—recordings, motion pictures, and photographs—are generally

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1. The tape recordings were not within the work product privilege. (a) In *Hickman* v. *Taylor, supra,* this Court held that, under the pre-trial discovery provisions of the Federal Rules of Civil Procedure, a party to pending litigation cannot obtain from counsel for an adverse party, on mere demand and as a matter of right, oral and written statements of witnesses which counsel had obtained in the course of preparation for possible litigation. The Court stated that since it was necessary that an attorney preparing a case be able to work "with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel" (pp. 510, 511), the broad sweep of the Federal discovery rules could not be interpreted to compel the production of written statements or mental impressions contained in an attorney's files and mind "without any showing of necessity or any indication or claim that denial

admissible to prove the events. *United States* v. *Schaneman*, 150 F. 2d 941, 944 (C. A. 3) (recordings); *United States* v. *Moran*, 194 F. 2d 623, 626 (C. A. 2), certiorari denied, 343 U. S. 965 (motion pictures); see 3 Wigmore on *Evidence* (3d Ed.), §§ 792, 798*a* (b); *id.*, 1953 Supp., § 792*a*. The state cases are to be the same effect. E. g., *Commonwealth* v. *Clark*, 123 Pa. Super. 277, 285, 187 A. 237, 240 ("speak-o-phone" records); *McGoorty* v. *Benhart*, 305 Ill. App. 458, 468–472, 27 N. E. 2d 289, 294 (motion pictures); *Frank* v. *Cossitt Cement Products, Inc.*, 197 Misc. 670, 672, 97 N. Y. Supp. 2d 337 (wire recordings); *People* v. *Hayes*, 21 Cal. App. 2d 320, 71 P. 2d 321 (sound motion picture); *State* v. *Spencer*, 258 P. 2d 1147, 1152–1153 (Idaho) (wire recordings); *Kilpatrick* v. *Kilpatrick*, 123 Conn. 218, 223–226, 193 A. 765, 767–769 ("speak-o-phone" records and transcripts thereof).

of such production would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice" (p. 509).[23]

The Court expressly stated, however, that it was not holding that *all* written materials obtained or prepared by an adversary's counsel with an eye toward litigation "are necessarily free from discovery in all cases," since "[w]here relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had" (p. 511). It pointed out that such written statements and documents "might, under certain circumstances, *be admissible in evidence* * * *" (*ibid.*, emphasis added). Thus this Court specifically rejected the theory of the Court of Appeals in *Hickman,* that all work materials in a lawyer's possession are privileged.[24]

(b) The *Hickman* case applied the work product privilege to deny discovery sought against counsel for an adverse party in pending litigation. The considerations which justify the existence of the privilege in that situation, however, have no applicability where, as here, the material is sought not by a litigation adversary, but by a

[23] The Court pointed out that if materials reflecting a lawyer's mental processes were open to opposing counsel on "mere demand," an attorney's "heretofore inviolate" thoughts would not be his own, and that the effect upon the legal profession would be "demoralizing" and the interests of clients and of justice would be "poorly served" (p. 511).

[24] *Hickman* v. *Taylor*, 153 F. 2d 212 (C. A. 3).

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party to another case in which the lawyer is not participating.

Production of the material to such a non-adversary creates no danger that the lawyer involved may be subject to "undue and needless interference" from *"opposing parties and their counsel"*—the consideration upon which discovery was denied in the *Hickman* case. No sound public policy would be served by extending the privilege to cover use of the material by third persons in a different case. On the contrary, such an unwarranted broadening of the privilege would hinder, rather than help, the ascertainment of the truth,[25] and thus would contravene the "fundamental basis upon which all rules of evidence must rest—* * * their adaptation to the successful development of the truth." *Funk* v. *United States,* 290 U. S. 371, 381.

Apart from the traditional lawyer-client privilege—which McConnell specifically disclaimed at the trial (R. 165) and which plainly is not applicable here[26]—a lawyer's status gives him no claim to special treatment when he is called upon to produce evidence in his possession. Cf. *Modern Woodmen of America* v. *Watkins,* 132 F. 2d 352, 354 (C. A. 5); *Steiner* v. *United States,* 134 F. 2d 931, 935 (C. A. 5), certiorari denied, 319 U. S.

[25] Note, 62 Harv. L. Rev. 269, 273–274, 276.

[26] *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357, 361 (D. Mass.).

774. The work product privilege should be restricted to its basic purpose: protection of lawyers in their capacity as adverse trial counsel. *Hickman* case, *supra; Scourtes* v. *Fred W. Albrecht Grocery Co.*, 15 F. R. D. 55, 58 (N. D. Ohio); Note, 62 Harv. L. Rev. 269, 273–274, 276.

(c) But even if, under *Hickman* v. *Taylor*, the work product privilege may be relied on to protect material in the possession of a non-adversary attorney from disclosure, the privilege still would not cover the recordings in this case. Written statements or other documentary evidence in an attorney's files—as distinct from the lawyer's own work papers—which are admissible as evidence are not privileged, *Hickman* case, p. 511, Mr. Justice Jackson, concurring, *Id.*, p. 515,[27] and the same principle should govern admissible recordings. Here, the recordings incorporate little, if any, of the attorneys "mental impressions" (p. 510), and their production would not expose his "mental processes" to the "free scrutiny" of a litigation adversary (p. 514). Furthermore, upon a showing of good cause, discovery may be had of verbatim reproductions and transcriptions of statements of potential witnesses. *Hickman* case, pp. 512–513; *Molloy* v. *Trawler Flying Cloud*, 10 F. R. D. 158 (D. Mass.); *Scourtes* case, *supra*,

[27] "It seems clear and long has been recognized that discovery should provide a party access to anything that is evidence in his case."

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p. 59.[28] Finally, unlike the situation in *Hickman,* where the litigation was still in the pre-trial stage, here the *Dean* case had been concluded when the Government sought the recordings.[29] Thus, production of the tapes or disclosure of their contents could not have interfered with McConnell's conduct of the *Dean* litigation.

2. McConnell waived any privilege with respect to the tape recordings by releasing them to Newey and authorizing him to turn them over to the Government. As we have shown (*supra,* pp. 41–45), the district court improperly sustained McConnell's claim of work product privilege when the Government attempted to subpoena the tape recordings. But even assuming *arguendo* that initially the recordings were privileged, McConnell waived any privilege by turning them over to Newey and authorizing the latter to "submit the

[28] Cf. *Shields* v. *Sobelman*, 64 F. Supp. 619 (E. D. Pa.), holding that photographs taken pursuant to an attorney's direction in anticipation of, or preparation for, litigation, are not privileged against discovery. Accord: *Cogdill* v. *Tennessee Valley Authority*, 7 F. R. D. 411 (E. D. Tenn.); *Lauritzen* v. *Atlantic Greyhound Corp.*, 8 F. R. D. 237 (E. D. Tenn.), affirmed, 187 F. 2d 540 (C. A. 6).

[29] Although McConnell contended on the return of the subpoena that he was still "in a lawsuit" with some of the defendants (R. 165), the Judge in the *Dean* case previously had stated that that case "has now been ended by consent decree," and that, since a money judgment and an injunction had been entered, the "case has been concluded" (R. 160). This statement had been read into the record by Judge Campbell prior to his sustention of McConnell's claim of privilege.

tape recordings * * * to the defendants in the case as well as to the Government for their use in the case" (R. 149). And, once McConnell had waived his privilege, the district court had no basis for excluding the recordings from evidence (see *supra,* n. 22).

Since the purpose of the work product privilege is to protect an attorney engaged in preparing a case from the "unnecessary intrusion by opposing parties and their counsel," *Hickman* case, pp. 510–511, there is no reason for applying the privilege to material which the attorney himself has made available to third persons. And it is immaterial whether the attorney directly furnishes such material, or whether, as here, he does so indirectly by authorizing another person to make it available. In either situation, his release of the material terminates its privileged character.

A privilege is personal to the individual asserting it, and may be waived by him. 8 Wigmore on *Evidence* (3rd Ed.), § 2196, pp. 102–103, § 2327; *Steen* v. *First National Bank,* 298 Fed. 36, 41 (C. A. 8, 1924). Indeed, waiver of a privilege is in the "interest of truth and justice," and should, therefore, be favored. *Steen* case, *supra; Cafritz* v. *Koslow,* 167 F. 2d 749, 751 (C. A. D. C.). In the instant case, McConnell turned over the tape recordings and transcripts to Newey, and at the same time he specifically authorized the latter, "if the Court sees fit to require you to do so," to submit the recordings and transcripts to both the

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defendants and "to the Government for their use in the [instant] case." McConnell thus not only parted with the physical possession of the material, but specifically authorized the recipient to turn it over to the Government to "use in the case." In other words, McConnell abandoned his prior claim that the recordings were inviolate against disclosure.[30]

After McConnell had consented to the Government's use of the recordings in this case, Government counsel sought permission from the court "to set up in the court room the necessary equipment so that the tapes can be played" (R. 368). When the court then inquired whether McConnell was "now waiving his privilege," Government counsel handed to the court McConnell's letter to Newey authorizing the latter to allow the Government to use the tapes. The court, however, interpreted the letter as merely authorizing Newey "to refresh his recollection from certain tape recordings" (R. 369), and held that "the ruling made at the time Mr. McConnell asked for it [i. e., that the tapes were privileged] still stands," and

[30] The fact that McConnell's primary purpose in releasing the tapes to Newey may have been to allow Newey to refresh his recollection preparatory to testifying in the instant case, and that Newey's authority to turn over the tapes to the Government was to be exercised "if the Court sees fit to require you to do so," does not negate the waiver of privilege. Indeed, if the recordings were still privileged, the court could not, in accordance with McConnell's letter, properly authorize Newey to make them available to the Government.

that "[t]here is no use of producing the tape recordings here" (*ibid.*).

Thus, contrary to appellees' contention (Appellees' Motion to Dismiss or Affirm, p. 8) and to the statement in the district court's opinion (R. 96), the Government did not elect to call Newey to testify instead of offering the tapes, but was forced to call him as the result of the court's refusal to hear the recordings. Indeed, the Government had no choice but to put Newey on the stand if it wished to offer any evidence relating to the admissions which the defendants' agents had made to him.

3. The district court's exclusion of the tape recordings substantially prejudiced the Government. As we have noted, Newey's testimony—which was based on the recordings—contained admissions by the defendants that the dairies had an agreement not to take each other's customers (see *supra*, note 22). Had the district court given this evidence its normal probative weight, it would have constituted substantial proof of the Government's charge of conspiracy. Indeed, this evidence was particularly significant in that it showed that the conspiracy was still operative as recently as 1950. The district court found, however, that because of Newey's lack of independent recollection of his conversations with the defendants' agents, his testimony was "valueless,"

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and the court "completely disregard[ed]" it.[31] In so holding, the court noted that after each question was asked, Newey read "extensively" from transcripts of the recordings and his notes thereof, and that his answers "were almost all based upon such an extensive reading" (R. 96).

If the district court had admitted the tape recordings, Newey's lack of recollection would have posed no problem. With the actual oral statements before him, Judge Campbell could have given these damaging admissions the full weight to which they were entitled. Thus, the practical effect of the court's exclusion of the recordings was to deny the Government completely the benefit of Newey's important evidence.

C. THE ILLINOIS "DEAD MAN'S" STATUTE DOES NOT BAR MOSER'S TESTIMONY AS TO CONVERSATIONS WITH A DECEASED BORDEN OFFICIAL

When the Government sought to introduce testimony by Moser, an executive of an independent dairy, as to a conversation he had with a deceased sales manager of Borden, the district court excluded such testimony under the Illinois "dead man's" statute. That Act provides that:

[31] The fact that a witness has to refresh his memory extensively while testifying does not of itself make his testimony untrustworthy, but merely raises a question as to the reliability of the material which he uses. *United States* v. *Riccardi*, 174 F. 2d 883, 889–890 (C. A. 3), certiorari denied, 337 U. S. 941. During the time that Newey was testifying, the transcripts of the recordings were present in the courtroom and available for the court's examination. (Appellees' Motion to Dismiss or Affirm, p. 6.)

> * * * in every action, suit or proceeding a *party to the same* who has contracted with an agent of the adverse party—the agent having since died—shall not be a competent witness as to any admission or conversation between *himself* and such agent * * * [Ill. Rev. Stat., 1945, C. 51 § 4; emphasis added].

The court interpreted the statute as applying to "any conversation with a dead man * * *. I mean, the purpose of the rule is that where the lips of one party to a two-party conversation is sealed in death, the living party may not testify to what it was" (R. 156).[32]

This interpretation is untenable. For the statute by its express terms and as interpreted by the Illinois courts, applies only to a party to an action, and not generally to a survivor of a conversation. *Reilly Tar & Chemical Corp.* v. *Lewis*, 326 Ill. App. 117, 121; cf. *Hill* v. *A. J. Canfield Co.*, 157 F. 2d 849, 850 (C. A. 7).[33]

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[32] The court made this statement earlier in the trial, when the question first arose in connection with testimony relating to a conversation with another deceased official of one of the defendants (R. 156). When the issue was subsequently raised, the court refused to permit Government counsel to state his position on the question (R. 310, 360):

"The COURT. The objection is overruled [sustained].

"Mr. JINKINSON. Your Honor, this is the first time, I think, that we have a clear-cut issue in reference to the dead man's statute since it came up the first time. Since that time we briefed the law; I would like to be heard on it.

"The COURT. The ruling will stand. Proceed."

[33] The general purpose of this provision is, of course, to bar testimony not subject to independent corroboration when the

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Since Moser was not a party to the instant case, he was not disqualified under the statute from testifying as to his conversation with the deceased Borden official. Cf. *Delaney* v. *United States*, 263 U. S. 586, 590. His testimony related to a successful attempt by that official to coerce him into refraining from bidding on Borden's business in the future (see *supra*, pp. 25–26). It was plainly admissible and relevant, and its exclusion further deprived the Government of pertinent evidence probative of the conspiracy.

II

THE FACT THAT THE OUTSTANDING DECREE IN THE DEAN CASE ENJOINS THE DEFENDANTS FROM VIOLATING SECTION 2 (a) OF THE CLAYTON ACT DOES NOT BAR THE GOVERNMENT, IN ITS OWN ANTITRUST SUIT, FROM OBTAINING INJUNCTIVE RELIEF AGAINST SUCH VIOLATIONS

Although the district court found that the Government had shown that Borden and Bowman and their subsidiaries had discriminated in price among their wholesale customers (Fdg. 36, R. 121–122)—discriminations which established *prima facie* violations of section 2 (a) of the Clayton Act—the court nevertheless held that the Government could not obtain injunctive relief against

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witness' principal interest is to succeed in his law suit. Under another provision of the Illinois statute (Ill. Rev. Stat., 1945, C. 51, § 2) relating to suits against the estates of deceased persons, conversations with the deceased may be proved through witnesses who are not parties to the action or who have no direct pecuniary interest therein. *Creighton* v. *Elgin*, 387 Ill. 592, 605; *Schell* v. *Weaver*, 225 Ill. 159, 162.

such violations.[34] Its rationale was that the decree in the *Dean* case "effectively enjoined" these companies from performing any of the acts against which the Government had sought injunctive relief (Fdg. 38, R. 123; Conclusion of Law 9, R. 124–125). We submit, however, that the Government has an independent right to relief against violations of the Clayton Act, without regard to whether such violations previously have been enjoined by a decree in a private antitrust suit.

Section 15 of the Clayton Act makes it the "duty" of the several United States district attorneys, under the direction of the Attorney General, to institute civil proceedings to "prevent and restrain" violations of the Act, and vests in the Federal district courts jurisdiction of such proceedings. The existence of an outstanding judgment in a private antitrust suit does not

[34] Section 2 (a) of the Clayton Act makes it unlawful for any person engaged in commerce to discriminate in price between different purchasers of commodities of like grade and quality. Upon proof of such discrimination, the burden of justification is upon the person charged with violation (section 2 (b)). Price discriminations may be justified by showing that they reflect differences in cost of manufacture, sale, or delivery (section 2 (a)), or that they were made in good faith to meet an equally low price of a competitor (section 2 (b)).

The court stated that, since the Government had shown discriminations in price, "ordinarily" the defendants would have the burden of establishing that they came within the statutory exceptions. The court held, however, that there was "one factor" which relieved them from that burden—the decree in the *Dean* case (R. 108–109).

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terminate the Attorney General's duty to enforce the Act or the need for such enforcement, or the district court's duty to entertain such a proceeding. Obviously, a private judgment to which the Government is not a party does not bar a subsequent antitrust suit by the United States. In addition, even though an outstanding antitrust decree in favor of a private plaintiff initially may afford the public the same measure of protection as a decree in a Government suit, entry of a decree frequently is not the end of antitrust litigation, and subsequent action or inaction by the private parties may substantially weaken the decree's effectiveness as far as the public is concerned.

If the private decree is violated, the United States, not being a party to the suit, cannot bring contempt proceedings to enforce compliance, and the private plaintiff may have good reason for not instituting such proceedings. For example, if the violations are directed against his competitors instead of him, it may be to his interest to allow them to continue, even if the public generally may be injured thereby. The private controversy may be settled, compromised, or abandoned by the plaintiff for what to him is sufficient reason. Furthermore, the private parties, even though they fully comply with the decree, may seek modifications which, if granted, will substantially weaken its original protective effect. In-

deed, that very thing has happened in this case. Subsequent to entry of the judgment below, appellee Bowman has sought modification of the decree in the *Dean* case—the very decree upon which Judge Campbell based his refusal to grant injunctive relief to the Government—which could result in seriously weakening its prohibitory provisions.[35]

In short, the protection of the public which it is the object of the antitrust laws to insure cannot be achieved if the Government is denied the right to relief because of the existence of a private decree.[36] It was for this reason, presumably,

[35] Bowman's petition in the *Dean* case—pertinent portions of which are set forth in the Appendix to this brief—alleges that since entry of the consent judgment a number of independent milk distributors and vendors have, in violation of sections 2 (a), (d), and (e) of the Clayton Act, taken customers away from, and retained customers solicited by, Bowman, by discriminating in price in favor of such customers. The petition states that, unless such price discriminations are restrained, the *Dean* decree will be "frustrated and ineffective," since the parties to that decree, in order to preserve their business, "will be compelled to meet such competitive offers and practices which are of the type that the decree of this Court * * * was designed and intended to prohibit." The relief requested by Bowman is either that the court make such distributors and vendors parties defendant in the *Dean* case and subject to the decree, or alternatively that the court "direct" Bowman "as to such further course of action as to the Court may seem meet and appropriate in the premises to grant relief" to it and to the other parties.

[36] Government intervention in the private action would not be an adequate substitute for a decree in a Government suit. Such intervention—allowance of which is discretion-

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t Congress provided in the Clayton Act for arate enforcement actions by the Attorney neral under section 15 and by the private party der section 16.[37] The respective interests to be dicated in such actions are different—the pri-e party merely seeks to rectify his own per-nal "threatened loss or damage" (section 16), ile the Attorney General acts as the "repre-ntative of the public" (*United States* v. *Para-unt Pictures*, 334 U. S. 131, 177)—and the two its "may proceed simultaneously or in disre-rd of each other." *United States* v. *Bendix me Appliances*, 10 F. R. D. 73, 77 (S. D. N. Y.). *United States* v. *W. T. Grant Co.*, 345 U. S. 9, does not support the district court's ruling. hat case merely held that the Government had t shown that the chancellor had abused his dis-etion in denying an injunction in proceedings der section 8 of the Clayton Act where the

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, *General Electric Co.* v. *Hygrade Sylvania Corp.*, 45 F. pp. 714, 715, 719 (S. D. N. Y.), cf. *Sutphen Estates* v. *nited States*, 342 U. S. 19—would still deny the Govern-nt that effective control over the litigation which is essen-l to enforcement of the antitrust laws. Indeed, it is the ed for such control which has led the courts to deny pri-te parties intervention in Government antitrust cases nerally. *United States* v. *Northern Securities Co.*, 128 d. 808, 812 (S. D. Minn.), affirmed, 193 U. S. 197; see *nited States* v. *General Electric Co.*, 95 F. Supp. 165, 168 D. N. J.).

[37] The legislative history of the Clayton Act shows that ongress intended these suits to be "cumulative," not exclu-ve, remedies. S. Rep. 698, 63d Cong., 2d Sess., pp. 42–50; Cong. Rec. 16276, 16319; see *Federal Trade Commission Cement Institute*, 333 U. S. 683, 693–694.

violations had terminated shortly after the complaint had been filed. The Court stated that, in order to justify injunctive relief despite discontinuance of the illegal conduct, the moving party must show "that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." P. 633.

The decision in *Grant* thus was based on the fact that the Government had not shown the need for any injunctive relief. In the instant case, however, as we have noted, there is a real need for a decree in the Government suit, and entry of such decree would not be, as the district court characterized it, "a useless task" (R. 111).

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing the complaint should be reversed and the case remanded for a new trial.

Respectfully submitted.

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APRIL 1954.

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APPENDIX

[Excerpts from "Report and Petition for Relief b Bowman Dairy Company" filed by the latter in *Dean Milk Company* v. *American Processing & Sales Company, Inc., et al.*, No. 49 C. 1159, N. D. Ill., E. D.]

* * * * *

2. On to wit, July 21, 1949, Dean Milk Company, an Illinois corporation, filed against American Processing and Sales Company, The Borden Company, Bowman Dairy Company, Western-United Dairy Company, Capitol Dairy Company, Hunding Dairy Company, and others, a complaint in which plaintiff claimed that said defendants had violated Secs. 1 and 2 of the Sherman Act and Secs. 2 (a), 2 (d), 2 (e) and 2 (f) of the Clayton Act, as amended. On June 20, 1950, Dean Milk Company (hereinafter referred to as "Dean") filed its amended complaint realleging its claim that said defendants had violated said laws.

* * * * *

4. On September 25, 1952, the aforesaid parties entered into a stipulation subject to the approval of this Court that an injunction decree might be entered herein containing certain provisions. In Paragraph 1 (h) of said stipulation it was provided:

> The injunction decree shall contain a provision in and by which the Court re-

> tains jurisdiction of this cause to join other parties defendant hereto on the application of plaintiff or any defendant and to make such additional defendants parties to the aforesaid injunction decree or any other order or injunction decree.

Said stipulation was approved by this Court on September 25, 1952.

5. On December 3, 1952, a decree was entered by the Court upon the consent of the parties named in Paragraph 2 of this petition. The said decree included the following provisions, among others: [Provisions of the decree set forth.]

* * * * *

8. All of the distributors and vendors hereinafter listed have knowledge of the entry of the said decree dated December 3, 1952, and have generally or specifically familiarized themselves particularly with the terms of the said decree. Since the entry of such decree, each of the said distributors and vendors hereinafter listed has individually or by concert of action made gifts and loans of money, gifts of merchandise and gifts of fixtures and equipment and offered loans of money, loans of fixtures and equipment, and arranged and facilitated loans to store customers from others, and charged store customers lower prices for fluid milk than charged by such distributor or vendor to others of its store customers in Cook and Du Page Counties, and paid larger rebates, commissions and discounts in connection with the sale of fluid milk to former store customers of the Bowman Dairy Company than have been offered or paid by such distributors and vendors to others of their store customers, all for

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the purpose of and with the effect of obtaining the business and custom of the store customers of the defendant, Bowman Dairy Company. A list of such store customers whose business and custom has been lost by the defendant Bowman Dairy Company to such vendors and distributors is hereto attached, marked "Exhibit A" and by reference made a part hereof.

9. By means of the acts and practices alleged in Paragraph 8, each of the said distributors and vendors has obtained the fluid milk business of store customers formerly served by your petitioner and have retained the fluid milk business of other customers solicited by the petitioner. In addition, each of the said distributors and vendors has attempted to obtain the fluid milk business of other store customers served by the petitioner by offering to such customers gifts and loans of money and property and by offering to sell them fluid milk at prices lower than the prices then being charged by the said distributor or vendor to others of his or its store customers and by offering them rebates, commissions and discounts in connection with the sale of fluid milk, which exceed the rebates, commissions and discounts paid by the said distributor and vendor to his or its other customers. Wherefore, your petitioner alleges that unless restrained by this Court, the said distributors and vendors hereinafter listed will continue to obtain and attempt to obtain the fluid milk business of store customers of the petitioner by means of the aforesaid illegal acts, practices and offers, all to the damage of this petitioner in amounts which are not readily

susceptible of calculation and which said damage will be irreparable.

10. While engaged in such interstate commerce in fluid milk in the Counties of Cook and Du Page in the Northern District of Illinois and in the course of such commerce, the said distributors and vendors have discriminated in price between different purchasers of fluid milk of like grade and quality by means of the various acts, practices, inducements and offers hereinabove set forth and have thereby substantially injured competition between the customers receiving the benefits of such discrimination and their competitors, and have also injured competition between themselves and the various parties plaintiff and defendant to the aforesaid decree, including the petitioner. By such discriminations, each of the said distributors and vendors have discriminated among his or its store customers in the sale of fluid milk in the Counties of Cook and Du Page in the Northern District of Illinois and has thereby violated Secs. 2 (a), 2 (d) and 2 (e) of the Clayton Act, as amended.

11. Unless the said distributors and vendors are restrained from selling fluid milk to store customers and offering to sell fluid milk to other customers at discriminatory prices, and from engaging in the various discriminatory acts and practices hereinabove alleged, the intent and purpose of the aforesaid decree will be largely frustrated and ineffective for the reason that the parties to the said decree, in order to preserve the business and custom of the store customers individually served by the plaintiff and defendants in the above entitled cause, will be compelled

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to meet such competitive offers and practices which are of the type that the decree of this Court entered on to wit, December 3, 1952, was designed and intended to prohibit, and each of the said defendants and the plaintiff, including your petitioner, will be irreparably injured in its business and property by the loss of the business and custom of various store customers.

* * * * *

Wherefore, your petitioner, Bowman Dairy Company, prays that this Court enter an order making the said distributors and vendors hereinbefore listed in Paragraph 12 parties defendant in the above entitled cause in accordance with the provisions of Paragraph XVII of the decree dated December 3, 1952, and parties defendant to the said decree, or in the alternative, direct your petitioner as to such further course of action as to the Court may seem meet and appropriate in the premises to grant relief to your petitioner and the other parties plaintiff and defendant in the above entitled action.

BOWMAN DAIRY COMPANY,
a Corporation, Petitioner.
By ——— ———,
Its Attorneys.

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